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No. 09-109

In the Supreme Court of the United States

GERALD WILLIAM CARDINAL, PETITIONER

v.

LINDA METRISH, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record
THOMAS E. PEREZ
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an individual may sue a State or a state official in her official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a

substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress defined the statutory term "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, gathering substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Report*); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699 (2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (citation and internal quotation marks omitted), affected persons confined to correctional facilities in particular. See *House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House*

Comm. on the Judiciary, 105th Cong., 2d Sess. Pt. 3, at 41 (1998) (statement of Isaac Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[1] A covered "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a.

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation

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[1] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b).

of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioner was confined at the Hiawatha Correctional Facility (Hiawatha) of the Michigan Department of Corrections, where he participated in the facility's kosher meals program. Pet. App. 1a-2a, 20a. After several incidents of misconduct, petitioner was placed in temporary segregation. Because Hiawatha could not house inmates in temporary segregation for longer than eight hours, he was soon transferred to the Kinross Correctional Facility (Kinross). *Id.* at 2a. Kinross does not offer kosher meals and petitioner refused to eat the non-kosher meals provided. *Ibid.* Seventy-two hours elapsed before the staff at Kinross contacted its Health Services department about petitioner's situation; another two days passed before the warden at Kinross was notified that petitioner was refusing to eat the non-kosher meals; on the following day (petitioner's sixth at Kinross), petitioner was transferred to a third facility that both provides kosher meals and houses inmates in temporary segregation; and two more days elapsed before petitioner had access to a kosher meal at the new facility. *Id.* at 2a & n.1. Thus, petitioner was denied food that he could eat consistent with his religious beliefs for approximately 192 hours—a total of eight days. *Ibid.*

3. Petitioner filed a pro se complaint against respondent (the warden of Kinross) in her official capacity for violations of RLUIPA, seeking equitable relief and dam-

ages under the statute. Pet. App. 2a, 20a-21a.[2] Adopting the magistrate judge's report and recommendation (see *id.* at 28a-33a), the district court granted the respondent's motion for summary judgment. *Id.* at 3a, 19a-27a. The court acknowledged that the plain language of RLUIPA creates a cause of action against the State, and that the State waived its Eleventh Amendment immunity to suit for some form of relief by accepting federal funds. *Id.* at 23a. But the court held that RLUIPA's authorization of "appropriate relief" was not sufficiently clear to put States on notice that the acceptance of federal funds would subject them to money damages. *Id.* at 23a-25a.[3]

4. The court of appeals affirmed. Pet. App. 1a-15a. Addressing petitioner's claim for money damages under RLUIPA, the court considered whether such damages are encompassed in the "appropriate relief" authorized by 42 U.S.C. 2000cc-2(a), Pet. App. 6a-12a, an issue over which the circuit courts were and are divided, *id.* at 6a-7a. The court noted that the Eleventh Circuit had held that RLUIPA's authorization of "appropriate relief" against a government defendant authorizes private damages suits against States that accept federal funds, *Smith* v. *Allen*, 502 F.3d 1255, 1271 (2007), while the Fourth and Fifth Circuits had held the opposite, *Madison* v. *Virginia*, 474 F.3d 118, 122-123 (4th Cir. 2006); *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d

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[2] Petitioner's complaint also included a claim pursuant to 42 U.S.C. 1983 against respondent in her individual capacity for violations of the Eighth Amendment. Pet. App. 2a, 19a-20a.

[3] The district court also held that petitioner's claim for equitable relief was rendered moot by his transfer to a facility that provided kosher meals, Pet. App. 25a, and the court of appeals affirmed that holding, *id.* at 5a-6a.

316, 329-331 (5th Cir. 2009), petition for cert. pending, No. 08-1438 (filed May 8, 2009). Pet. App. 7a-10a. The court agreed with the Fourth and Fifth Circuits, holding that "RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages." *Id.* at 11a. Thus, the court concluded that "the Eleventh Amendment bars [petitioner's] claim for monetary relief under RLUIPA." *Id.* at 11a-12a.[4]

5. On November 2, 2009, this Court invited the Solicitor General to file a brief expressing the views of the United States on whether the Court should grant the petition for a writ of certiorari in this case and another case (*Sossamon* v. *Texas*, No. 08-1438 (filed May 18, 2009)). *Sossamon* presents the same question that petitioner raises in this case, as well as an additional question not presented here.[5]

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[4] Judge Clay concurred in part and dissented in part, Pet. App. 15a-18a. He would not have reached the question whether "the doctrine of sovereign immunity bars a plaintiff from recovering monetary damages under" RLUIPA. *Id.* at 15a-16a.

[5] For the reasons stated in the United States' amicus brief filed in *Sossamon*, *supra*, the petition for a writ of certiorari in *Sossamon* should be held pending this Court's disposition of the petition in this case. The instant case is a more appropriate vehicle for resolution of the question whether money damages are available against a State for violations of RLUIPA's protection of inmates' religious exercise. First, the additional question raised in *Sossamon* (whether RLUIPA creates a damages remedy against state officials in their individual capacities) is not the subject of a circuit split and does not otherwise warrant this Court's review. Second, the plaintiff in *Sossamon* may not be entitled to anything other than nominal damages in any case because he does not appear to allege a physical injury.

DISCUSSION

The court of appeals in this case erred in concluding that the Eleventh Amendment bars private parties from recovering monetary damages in suits seeking to enforce RLUIPA's institutionalized persons provisions. The courts of appeals are divided over the proper resolution of the question presented in this case, and there is no indication that the split in authority will resolve itself. On the contrary, because the division rests primarily on differing interpretations of this Court's precedents, it is necessary and appropriate for this Court to step in. This Court should grant the petition for a writ of certiorari to resolve the division among the courts of appeals and to correct the reasoning of the court of appeals in this case and in four other circuits.

A. The Court Of Appeals Incorrectly Concluded That A State That Accepts Federal Funds Does Not Waive Its Eleventh Amendment Immunity To Suits For Money Damages Under RLUIPA

This Court has made clear that Congress, in the exercise of its power under the Spending Clause, may condition the receipt of federal funds on a State's waiver of Eleventh Amendment immunity to suit—including suits seeking money damages. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Lane* v. *Pena*, 518 U.S. 187, 198-200 (1996). When Congress intends to attach such a condition to the receipt of federal funds, it must do so clearly and unambiguously. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985) (*Atascadero*); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Congress has done exactly that in two separate statutory provisions, thereby putting States on notice that, if they accept fed-

eral funds for their correctional systems, they will be subject to private suits in federal court to enforce RLUIPA's protection of inmates' religious liberties, including suits for money damages. By accepting such funds, a State knowingly waives its Eleventh Amendment immunity to RLUIPA claims brought by state inmates.

1. In 42 U.S.C. 2000d-7, Congress clearly conditioned a State's receipt of federal funds on its waiver of Eleventh Amendment immunity to damages suits to enforce various federal statutes, including RLUIPA

The court of appeals held (Pet. App. 6a) that Congress's authorization in RLUIPA of private suits seeking "appropriate relief" against States that accept federal funds is sufficient to put States on notice that, by accepting such funds, they consent to private suits in federal court seeking injunctive relief. The court also held (*id.* at 6a-12a), however, that RLUIPA's authorization of appropriate relief is insufficiently clear to effect a waiver of immunity to damages claims under RLUIPA. But the court did not need to reach that question because Congress explicitly conditioned the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity to suits seeking both types of relief when Congress enacted a statutory provision titled "Civil rights remedies equalization" in 1986. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100

Stat. 1845 (42 U.S.C. 2000d-7).[6] That provision provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. 2000d-7(a)(1) (brackets in original) (emphasis added). Section 2000d-7(a)(2) further specifies that a plaintiff may recover "remedies both at law and in equity" against a State for a suit brought under Section 2000d-7(a)(1).

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[6] It appears that the court of appeals did not consider whether Section 2000d-7 applies to RLUIPA claims. See Pet. App. 5a-12a; see also *id.* at 16a-17a (noting that petitioner filed his brief pro se and that respondent did not file a brief at all in the court of appeals). This Court would nevertheless be free to consider whether Section 2000d-7's requirement that federal fund recipients waive their Eleventh Amendment immunity applies to RLUIPA claims under the Court's "traditional rule" that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 375, 379 (1995) (brackets in original). The argument that a State waives its immunity pursuant to Section 2000d-7 is "not a new claim within the meaning of that rule, but a new argument to support what has been [petitioner's] consistent claim:" that he is entitled to sue respondent in her official capacity for money damages under RLUIPA. *Ibid.*

Section 2000d-7 was enacted in response to this Court's decision in *Atascadero*, 473 U.S. at 246, which held that Congress had not used sufficiently clear statutory language in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to claims brought under that section. The Court reaffirmed in *Atascadero* that "mere receipt of federal funds" by a State is insufficient to constitute a waiver of immunity, while confirming that, if a statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the acceptance of funds constitutes a waiver. 473 U.S. at 246-247; *College Sav. Bank*, 527 U.S. at 686.

Section 2000d-7 provides the unequivocal notice demanded by this Court's precedents to "enable the States to exercise their choice [to accept federal funds] knowingly, cognizant of the consequences of their participation" in a federal spending program. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*). Section 2000d-7 makes clear that a State or state agency that accepts federal funds will be subject to private suits (including suits for money damages) in federal court to enforce "any * * * Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. 2000d-7(a)(1). See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 78 (1992) (Scalia, J., concurring) (explaining that Section 2000d-7 "must be read * * * as an implicit acknowledgment that damages are available" in suits against States). RLUIPA is such a statute.

Although the court of appeals did not consider the applicability of Section 2000d-7 to this case, some courts

of appeals have held (and respondent argues, Resp. Br. at 6-8, in *Sossamon* v. *Texas*, *supra* (No. 08-1438)) that Section 2000d-7's catch-all provision does not waive immunity from a suit like petitioner's because the relevant statutory protection in RLUIPA does not use the word "discrimination." *Madison* v. *Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2000); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 654-655 (8th Cir. 2009), petition for cert. pending, No. 09-821 (filed Jan. 8, 2010). But that argument inappropriately narrows the meaning of the word "discrimination" as used in Section 2000d-7. This Court has already held that the word "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment," and that, "by using such a broad term, Congress g[i]ve[s] the statute a broad reach." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). So too in Section 2000d-7: when Congress clearly conditioned federal funds on a State's waiver of Eleventh Amendment immunity to claims under "any" federal statute "prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. 2000d-7(a), it thereby included statutes prohibiting a broad range of discriminatory conduct.

That broad range of conduct may include a failure to make reasonable accommodations as prescribed by law. Section 504 of the Rehabilitation Act—the very statute at issue in *Atascadero* and listed first in Section 2000d-7—demonstrates how a prohibition on "discrimination" may include an affirmative accommodation requirement such as that in RLUIPA. For decades, regulations have interpreted Section 504's ban on disability-based discrimination to require that covered entities make "reasonable accommodation[s]" for qualified per-

sons with disabilities. See, *e.g.*, 28 C.F.R. 41.53.[7] And Section 504's affirmative accom-modation obligation is similar to requirements in other statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In Title VII, Congress explicitly stated that its prohibition of discrimination on the basis of religion includes a requirement that employers provide reasonable religious accommodations to employees' religious observance and practice. See 42 U.S.C. 2000e-2(a), 2000e(j). Similarly, Congress's reference in Section 2000d-7 to statutes prohibiting "discrimination" should be understood to include RLUIPA's requirement of such accommodations in the prison setting.

Indeed, the potential linkage between a failure to make a reasonable religious accommodation and a prototypical act of animus-based discrimination is evident in the complaint petitioner filed in this case. See Pl.'s Amended Compl., 2:06-cv-232 Docket entry No. 20 para. 20 (W.D. Mich. Feb. 8, 2007) (Amended Complaint) (alleging that prison staff laughed at petitioner and asked, "How does it feel Kosher boy?" in response to his

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[7] This Court has similarly interpreted the term "discrimination" broadly in other statutes specifically enumerated in Section 2000d-7. For example, the Court has repeatedly interpreted the general prohibition of sex discrimination in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681, to include more than a simple ban on traditional disparate treatment. Rather, the Court has interpreted the prohibited "discrimination" to include a school's deliberate indifference to teacher-on-student or student-on-student sexual harassment, see *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 649-651 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-290 (1998); *Franklin*, 503 U.S. at 74-75, as well as retaliation for complaining about sex discrimination, *Jackson*, 544 U.S. at 174; accord *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1936 (2008); *CBOCS W., Inc.* v. *Humphries*, 128 S. Ct. 1951, 1960-1962 (2008).

requests for any bit of food he could eat).[8] That linkage confirms that RLUIPA "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles* v. *Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (quoting *Mayweather* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003)); see *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.).

Because RLUIPA is a "[f]ederal statute prohibiting discrimination by recipients of Federal financial assistance," the State of Michigan was put on notice by the plain language of Section 2000d-7 that its acceptance of federal funds for its correctional system would constitute a waiver of its Eleventh Amendment immunity to RLUIPA claims, including claims for money damages. That is a sufficient basis on which to sustain petitioner's RLUIPA claim against respondent, and the court of appeals erred in affirming the dismissal of that claim without regard to Section 2000d-7.

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[8] Moreover, RLUIPA includes an explicit prohibition on discrimination on the basis of religion by any government entity in the implementation of a land use regulation. 42 U.S.C. 2000cc(b). The close proximity of this explicit prohibition to the accommodation requirement specified for institutional settings demonstrates that Congress saw the two as of a piece—both meant to cure the inequitable treatment of religious persons by government officials.

2. In the text of RLUIPA itself, Congress also clearly conditioned the receipt of federal funds on a State's waiver of its immunity to private damages actions in federal court to enforce the statute

Independent of Section 2000d-7, Congress stated in RLUIPA itself that private individuals "may assert a violation" of RLUIPA "as a claim or defense in a judicial proceeding and obtain appropriate relief against a government," 42 U.S.C. 2000cc-2(a), including "a State," 42 U.S.C. 2000cc-5(4)(A)(i). The courts of appeals apparently agree that this provision places a State on notice that, when it accepts federal funds for its correctional system, it waives its Eleventh Amendment immunity to RLUIPA claims for declaratory and injunctive relief. *Van Wyhe*, 581 F.3d at 653-655; *Nelson* v. *Miller*, 570 F.3d 868, 884-885 (7th Cir. 2009); *Sossamon*, 560 F.3d at 331; *Madison*, 474 F.3d at 130-131; *Benning* v. *Georgia*, 391 F.3d 1299, 1305-1306 (11th Cir. 2004); Pet. App. 6a-12a. The courts of appeals disagree, however, about whether the authorization of "appropriate relief" is sufficient to put States on notice that they will be subject to suits for money damages.

This Court has frequently considered the scope of relief available to private individuals in suits brought to enforce civil rights laws enacted pursuant to the Spending Clause, specifically Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, Title IX, and Section 504. Each of those statutes is enforceable by individuals through a private right of action, see *Barnes* v. *Gorman*, 536 U.S. 181, 185-186 (2002), but that right of action is implied, so nothing in the statutory text specifies what remedies are available. In lieu of that provision, this Court has held that those statutes permit individual litigants to seek "appropriate relief,"

and that "appropriate relief" includes compensatory money damages. See *id.* at 186-189; *Franklin*, 503 U.S. at 68-71.

Although determining the remedies available under RLUIPA involves interpreting the statutory phrase "appropriate relief" rather than specifying an aspect of an implied private right of action, the reasoning this Court employed in cases such as *Barnes* and *Franklin* dictates the same result. In *Franklin*, the Court confronted the question whether money damages are available in private suits under Title IX. In answering that question affirmatively, the Court explained that, when a statute creates a legal right and permits an individual to sue for invasion of that right, the Court "presume[s] the availability of *all appropriate remedies* unless Congress has expressly indicated otherwise." 503 U.S. at 66 (emphasis added); see *id.* at 68; *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). Specifically rejecting the contention that remedies under Title IX should be limited to injunctions and other equitable remedies, the Court further noted that "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin*, 503 U.S. at 75-76.

Particularly relevant to the issue presented here, the Court in *Franklin* eschewed a rule "that the normal presumption in favor of all appropriate remedies should not apply" to statutes "enacted pursuant to Congress' Spending Clause power." 503 U.S. at 74. Instead, the Court held that the availability of money damages for intentional violations of Spending Clause legislation is presumed so long as Congress clearly alerts fund recipients about the substantive requirements of the statute. *Id.* at 74-75.

The Court reaffirmed that rule in *Barnes*, holding that compensatory damages are available for violations of Section 504, although punitive damages are not. The Court explained that Spending Clause legislation is "much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes*, 536 U.S. at 186 (brackets in original) (quoting *Pennhurst*, 451 U.S. at 17). Although not all contract rules apply to Spending Clause legislation, this Court explained that the contract "analogy applies * * * in determining the *scope* of damages remedies." *Id.* at 187. Thus, a remedy for a violation of Spending Clause legislation "is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Ibid.* (quoting *Franklin*, 503 U.S. at 73) (internal citation omitted). That principle determined the appropriate scope of relief in a suit against a government entity for violating a funding condition: the fund recipient "is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including compensatory (but not punitive) money damages. *Ibid.*

If, instead of specifying that "appropriate relief" is available to private plaintiffs under RLUIPA, Congress had been altogether silent about the available scope of relief, this Court's holdings in *Franklin* and *Barnes* would fill the gap by specifying that compensatory damages are available. The result should be no different just because Congress in RLUIPA included an additional layer of clarity, specifically noting the availability of "appropriate relief." That is particularly true in light of Congress's adoption of the precise phrase this Court

used in *Franklin* and *Barnes* to describe the scope of relief (including money damages) that is generally available in a private suit against a party for violating a condition of federal funding.[9]

Respondent argues (Resp. Br. 11) that the rules articulated in *Franklin* and *Barnes* do not apply to RLUIPA because neither case involved a defendant entitled to Eleventh Amendment immunity. But the requirement that conditions attached to federal funds be unambiguously expressed does not vary according to the type of entity accepting the conditioned funds. That notice requirement, which formed the basis of the decisions in *Franklin* and *Barnes*, applies regardless whether Congress offers financial assistance to States, to local governments, or to private entities. *E.g.*, *Gebser*, 524 U.S. at 287 (noting necessity of "ensuring that 'the receiving entity of the federal funds [has] notice that it will be liable for a monetary award") (brackets in original) (quoting *Franklin*, 503 U.S. at 74). If other entities have sufficient notice of the availability of money damages in suits to enforce funding conditions, so too do States. To be sure, States and state agencies receiving federal funds start out with Eleventh Amendment immunity—to suits for injunctive relief as well as damages—while other entities do not. But that difference relates only to the situation that would exist *in the absence of* any clear condition in a federal spending statute

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[9] Congress's intention to provide private claimants with the ability to seek money damages is also apparent from the statute's express limitation on remedies the Attorney General may seek in enforcing RLUIPA. That limitation of remedy to "injunctive or declaratory relief," 42 U.S.C. 2000cc-2(f), would be utterly superfluous if plaintiffs in the private action established by the statute could not receive other remedies.

regarding private suits for money damages. The prospect of Eleventh Amendment immunity in that circumstance does not make a State any less able than another party to understand that a federal spending statute in fact includes such a clear condition.

In holding that a different standard applies in suits against States than in suits against other parties, the courts of appeals have ventured outside the Spending Clause context and relied instead on this Court's cases involving the federal government's waiver of *its own* sovereign immunity. *E.g.*, Pet. App. 10a-12a; *Madison*, 474 F.3d at 131-132; *Van Wyhe*, 581 F.3d at 653. In *Lane* v. *Pena*, *supra*, for example, the Court concluded that the holding in *Franklin* that the "implied private right of action under Title IX * * * supports a claim for monetary damages" does not apply to suits against the federal government. Instead, when a statute authorizes suit against the federal government, "the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." 518 U.S. at 196-197.

But the federal government's voluntary waiver of its sovereign immunity is not akin to a State's waiver of Eleventh Amendment immunity in exchange for clearly conditioned federal funds. In the former case, the enactment of federal legislation itself constitutes the waiver, and the Court requires Congress to speak clearly in that legislation about both the Government's amenability to

suit and the relief available in such a suit.[10] But when Congress conditions the receipt of federal funds on a State's waiver of immunity, the waiver comes not from the terms of the legislation, but from the State's acceptance of funds with knowledge of the consequences. Here, a State has such knowledge because this Court has made clear that, when Congress attaches substantive conditions to the receipt of federal funds and (explicitly or implicitly) authorizes private parties to sue for violation of those conditions, those parties may seek money damages. Thus, when a State accepts federal funds for its correctional system, it does so cognizant of the following consequences: that it must comply with the substantive requirements of RLUIPA; that state inmates may sue for breach of those requirements; and that, if such an inmate prevails on the merits, the State will be liable for compensatory damages (unless otherwise prohibited, see pp. 21-22, *infra*).

B. The Courts Of Appeals Are Divided On The Question Presented

The Court should grant the petition for a writ of certiorari not only to correct the court of appeals' erroneous holding, but also to resolve the division of authority among the courts of appeals.

To date, five courts of appeals (including the court of appeals in this case) have issued published decisions holding that money damages are not available against

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[10] Thus, for example, in *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022 (2006), the District of Columbia Circuit correctly held that the term "appropriate relief" as used in the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*—which applies only to the federal government—is insufficient to waive the federal government's sovereign immunity from suits for monetary damages.

States for violations of RLUIPA. One has held the opposite.

The first court of appeals to consider the question presented was the Fourth Circuit, which held in *Madison*, 474 F.3d at 129-133, that RLUIPA's failure to explicitly authorize money damages precluded individuals from recovering such relief against States. The Fourth Circuit also held in *Madison* that Section 2000d-7 does not condition the receipt of federal funds on a State's waiver of immunity to a suit brought under RLUIPA because RLUIPA is not clearly a statute "prohibiting discrimination." *Id.* at 133.

Soon after *Madison*, the Eleventh Circuit reached the opposite conclusion, holding that RLUIPA's authorization of "appropriate relief" is sufficient to authorize suits for monetary damages against States and state officials acting in their official capacities. *Smith* v. *Allen*, 502 F.3d 1255, 1271 (2007). The Eleventh Circuit's decision in *Smith* followed its previous decision in *Benning* v. *Georgia*, 391 F.3d 1299, 1305 (2004), which held that "Congress unambiguously required states to waive their sovereign immunity from suits" under Section 3 of RLUIPA, but which did not address the types of relief available to private plaintiffs. *Id.* at 1306. Relying on this Court's decision in *Franklin*, 503 U.S. at 68-69, the Eleventh Circuit in *Smith* explained that, when Congress does not specify what remedies are available, courts should presume the availability of all appropriate remedies. 502 F.3d at 1270-1271. Assuming that Congress was aware of this Court's holding in *Franklin* and noting that Congress did nothing to limit the remedies set forth in 42 U.S.C. 2000cc(a), the court held that RLUIPA's reference to "all appropriate relief" encompasses money damages. *Smith*, 502 F.3d at 1270-1271.

Since the Eleventh Circuit's decision in *Smith*, four other courts of appeals have joined the Fourth Circuit in holding that money damages are not available to States in suits such as petitioner's. *Sossamon*, 560 F.3d at 330; Pet. App. 5a-12a; *Nelson*, 570 F.3d at 884; *Van Wyhe*, 581 F.3d at 653.[11]

The division in authority on the question presented is ripe for resolution by this Court. Contrary to respondent's suggestion (Resp. Br. 9), there is little reason to expect that the Eleventh Circuit will "revisit" this question "in light of subsequent case law" generated from other courts of appeals. When the Eleventh Circuit decided *Smith*, it acknowledged the Fourth Circuit's contrary decision in *Madison*, see *Smith*, 502 F.3d at 1270. The Eleventh Circuit subsequently denied rehearing en banc in *Smith*, see 277 Fed. Appx. 979 (2008), and has continued to adhere to its position despite additional courts of appeals' agreeing with the Fourth Circuit in *Madison*. See, *e.g.*, *Hathcock* v. *Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008).[12] The conflicting courts of appeals' decisions are based on divergent interpretations of this Court's precedents, and only this Court's intervention will resolve the dispute.

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[11] In addition, shortly after the Eleventh Circuit's decision in *Smith*, the Third Circuit held, in an unpublished opinion devoid of analysis on the issue, that the Eleventh Amendment barred a prisoner's RLUIPA claim against a prison warden in his official capacity. *Scott* v. *Beard*, 252 Fed. Appx. 491, 492-493 (2007).

[12] The courts of appeals that have considered the question in this case since the decisions in *Smith* and *Madison* have done little more than adopt *Madison*'s reasoning as their own. *Van Wyhe*, 581 F.3d at 654; *Nelson*, 570 F.3d at 884; *Sossamon*, 560 F.3d at 330-331; Pet. App. 6a-12a.

C. This Case Presents An Appropriate Vehicle For Resolution Of The Question Presented

Contrary to respondent's contention (Resp. Br. 6-8), the instant case is an appropriate vehicle for this Court's resolution of the question presented. Respondent is correct that the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). But even assuming that imposing a substantial burden on an individual's religious exercise in violation of RLUIPA qualifies as a mental or emotional injury—which petitioner does not concede (see Pet. Reply Br. 6-8)—petitioner here does allege a physical injury. Petitioner alleges that he was deprived of food that he was able to eat for eight days, as a consequence of which he lost 15 pounds, and suffered "bad abdominal pain," "dizziness," "headaches," and uncontrollable trembling of his legs. Amended Complaint paras. 30-32. Thus, this case is a more suitable vehicle for resolution of the question presented than most cases in which the issue will arise. See *Mitchell* v. *Horn*, 318 F.3d 523, 534 (3d Cir. 2003); *Pratt* v. *Corrections Corp. of Am.*, 124 Fed. Appx. 465, 467 (8th Cir. 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General
THOMAS E. PEREZ
Assistant Attorney General
NEAL KUMAR KATYAL
Deputy Solicitor General
SAMUEL R. BAGENSTOS
Deputy Assistant Attorney General
SARAH E. HARRINGTON
Assistant to the Solicitor General
JESSICA DUNSAY SILVER
ANGELA M. MILLER
Attorneys

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